IN THE

SUPREME COURT OF THE [illegible]

October Term, 1924.

GULF REFINING COMPANY,

Petitioner,

vs.

MARK O. WALKER & SON COMPANY, HARTFORD ACCIDENT & INDEMNITY COMPANY, and COUNTY OF SHELBY, TENNESSEE,

Respondents.

PETITION OF [illegible] FOR WRIT OF [illegible] TO REVIEW DECREE OF [illegible] IN CAUSE OF MARK O. WALKER & SON COMPANY, AND BRIEF IN SUPPORT THEREOF.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1941.

GULF REFINING COMPANY,
Petitioner,

vs.

MARK C. WALKER & SON COMPANY, HARTFORD ACCIDENT & INDEMNITY COMPANY, and COUNTY OF SHELBY, TENNESSEE,
Respondents.

No. 1114.

RESPONSE OF SHELBY COUNTY TO PETITION FOR WRIT OF CERTIORARI OF MARK C. WALKER AND SON COMPANY, AND BRIEF IN SUPPORT THEREOF.

STATEMENT OF THE CASE.

This Petition for Certiorari involves two separate and distinct law suits, one of which originated in the Federal Court and the other in the State Court at Memphis, Shelby County, Tennessee.

This respondent, Shelby County, is a party to and interested in only the suit which was brought against it in the Federal Court,—*Gulf Refining Company vs. Mark C. Walker & Son Company,* No. 1114 in this Court.

This respondent was dismissed by the Federal trial judge and that Order of Dismissal was affirmed by the Circuit Court of Appeals.

There was, therefore, a concurrent finding of the Federal trial judge and the Circuit Court of Appeals that Shelby County was not liable in this law suit.

This Petition for Certiorari sets out no new grievance whatever so far as that concurrent dismissal is concerned. It merely rehashes grounds presented to the Court of Appeals and which were held by that Court as insufficient and unavailing.

The most liberal extension of the language of Section 240 of the Judicial Code, upon which petitioner relies for the jurisdiction of the Supreme Court, does not give the Supreme Court jurisdiction to review the decree in case No. 1114,—the only case with which this respondent is concerned.

The Federal question of the violation of the Seventh Amendment to the United States Constitution is confined to case No. 1115 in which this respondent is not a party and has no concern.

The filing of a Petition for Certiorari in both cases (1114 and 1115) for the decision of a Federal question which has arisen in only one of them (1115), is an improper attempt to secure a review of a concurrent opinion of the Federal Trial Court and the Court of Appeals in case No. 1114, for which Section 240 of the Judicial Code furnishes no authority whatever.

The separate decrees entered in the two cases in the Court of Appeals are independent of one another and the review and redress of one of them does not necessitate any consideration or review of the other.

The reasons relied on for the allowance of the writ as against this defendant and to which this response will be confined are found on pages six through eight of petitioner's Brief and are numbered II, III, IV, and VI.

In the original and amended complaints (R. p. 5, p. 38) the petitioner without making an election, sought to hold Shelby County liable in damages both for breach of contract and for negligence in tort.

(1) The liability of the County for breach of contract is based on

(a) The alleged breach of a covenant in a formal easement deed given by Gulf Refining Company to Shelby County and its assigns on the fourteenth day of February, 1939 (R. p. 11), "that proper and adequate provision shall be made for the continued use of the existing pipe lines."

(b) The alleged unauthorized assignment of rights given personally to the County in a letter of March 11, 1939, from R. W. Lynch, Petitioner's Superintendent, to William B. Fowler, City Engineer (R. p. 40). *The letter is addressed to the City Engineer and the County is not mentioned in it.*

(2) The theory on which petitioner charges the County with liability in tort for negligence is that

(a) "The County is liable for negligence when engaged in a governmental function and there is a departure from County property and a wrong to private property." (Br. p. 11). Until the decision of this case in the Court of Appeals, petitioner had insisted that the County's participation in the work involved in this litigation was a non-governmental undertaking. This position seems to have been abandoned by petitioner as untenable.

(b) By the Federal Flood Control Act, 33 U.S.C.A., par. 701 c, which is made a part of the Original Complaint, it was provided that for the control of the flood waters of the Mississippi River, if Memphis and Shelby County would, without expense to the United States Government, furnish the necessary easements and rights-of-way and give assurance to the Government that the title to the easements and rights-of-way were good, and agree to indemnify the Government against claims arising against defects in title, that the United States Government, acting by and through its Corps of Engineers and in accordance with plans to be made by them, would construct wholly at the expense of the United States Government, levees, pumping stations, flood walls, floodways, dams, and other works for flood control.

The City of Memphis and County of Shelby agreed to cooperate and to furnish easements and rights-of-way for the Federal Flood Control Project on Nonconnah Creek south of Memphis and on Wolf River north of Memphis and to that end sought and obtained authority from the Legislature of the State of Tennessee for bond issues and the levy of taxes for the expense to the County and City of these improvements. These enabling Acts for the Project are Chapters 534 and 897, Private Acts of Tennessee, 1937.

The County and City obtained the necessary easements and rights-of-way, gave the necessary assurance to the United States Government, which proceeded to accept these easements and rights-of-way and in accordance with plans and specifications of the United States Corps of Engineers, let contracts for the construction of levees and other Flood Control Projects.

One of the easements obtained was that of the Gulf Refining Company, which was in the form of a deed from the Company to Shelby County, covering the land of the Company on which the levee would be built and containing covenants for rights of ingress and egress and of indemnity and release to Shelby County, its successors and assigns, from any and all damages by reason of constructing the levees, flood walls, and appurtenant structures, and the exercise and use of rights conveyed in the easement. The consideration for the easement granted was One ($1.00) Dollar, the construction and maintenance of the levee, proper and adequate provision for continued use of existing pipe lines, reversal of drainage, and the erection and maintenance of a private road across the levee. (R. p. 11)

Almost a month after the giving of the original easement in March, 1939, Petitioner's Superintendent Lynch wrote W. B. Fowler, City Engineer, a letter confirming a conversation in Fowler's office and giving permission of the Gulf Refining Company to fill a ditch on its property to protect the proposed levee. (R. p. 40.) This letter was asked and given, according to Lynch and Fowler's testimony, because the United States Engineers had decided that to protect the levee the filling of the ditch had to be included in the work for which the Engineers were

letting contracts, although it was not contemplated when the original easement was obtained.

The damage to the pipe lines was done to them where they crossed the ditch and was not done to them on land covered by the original easement.

The County was dismissed on the Original and Amended Complaint before the trial and, therefore, no witnesses were introduced on behalf of the County at the trial nor was the County represented at the trial. On April 6, 1940, a judgment was entered against Weaver, the subcontractor, for nine ($9,000) thousand dollars.

BRIEF AND SUMMARY.

1. **Shelby County is not liable for breach of contract** either on

(a) the covenant in the easement of the 14th of February, 1939, "that proper and adequate provision shall be made for the continued use of the existing pipe lines" because such proper and adequate provision *was* made in the plans for the new levee.

In its opinion (R. p. 426) the Court of Appeals said of this covenant, "To read into it a general guarantee against damage would be in conflict not only with the general tenor of the agreement and with the specific release and acquittance of the County therein contained, but would raise a serious question as to the authority of the County to undertake such obligation."

Petitioner in his Brief, at the bottom of page 25, by quoting only part of the foregoing paragraph of the

opinion, gives an entirely erroneous impression of the holding of the Court of Appeals;

(b) on the letter of March 11, 1939, from R. W. Lynch, petitioner's Superintendent, to William B. Fowler, City Engineer, because

(1) This letter was a supplement to the contract set out in the easement and governed by all its terms and conditions;

(2) This letter does not give a personal license to *Shelby County* because it is addressed to William B. Fowler as *City* Engineer;

(3) Because it is to be construed with the formal easement which is made to Shelby County and its *assigns*, with covenants to Shelby County and its *agents*, for ingress and egress, and for release and acquittal of all claims for damages growing out of the construction of the levee;

(4) The formal easement expressly grants rights not only for the construction and maintenance of the main levee but for "additions thereto" and "appurtenant structures."

The Trial Court was justified in dismissing Shelby County on the complaint and amended complaint on the law but it would have been compelled to dismiss the County at the end of the Plaintiff's proof on the evidence

(1) because Shelby County took no part whatever in the construction of the levee or its appurtenances ex-

cept to acquire and transfer to the United States Government the necessary easements and rights-of-way;

(2) because neither under the Act of Congress authorizing the work nor under the work as it was actually done, did Shelby County or any of its officers or agents let any contracts for construction, exercise any supervision over the construction work or do any of it themselves.

(3) Because Plaintiff's witnesses, Lynch, its Superintendent, and Fowler, City Engineer, knew the function of the County at the time of the grant of the easement as well as at the time of the writing of the letter of March 11th. Both parties knew (R. pp. 125, 126, 202, 203), that the County would do no work and let no contract for the work.

(4) Both Lynch and Fowler testified that the letter of March 11th was asked for and given because "they" wanted to fill the ditch and these witnesses both definitely testified that "they" meant the United States Engineers. (R. pp. 125, 202.) *Shelby County was never mentioned.*

From the testimony of these witnesses of the Plaintiff it is quite clear that there was no difference between the letter of March 11th and the formal easement so far as the functions of the parties was concerned. Permission to fill the ditch was asked for and given as an integral part of the plans for the levee, and, as stated in the letter, for its protection. These two documents, the formal easement and the subsequent letter relating to the same subject matter, as indicated by the language contained in

them, are to be construed together and the letter limited and defined by the provisions of the easement.

Lynch v. Bank, etc. (Cal.) 37 Pac. 716;
17 C. J. S. 715;
6 R.C.L. p. 850, Sec. 240.

II. Shelby County is not liable in tort for the negligence of its officers, subordinate agents or independent contractors even though they be engaged in a private, unauthorized undertaking and commit an active wrong on private property.

Petitioner, in its Original Complaint (R. p. 9), made this statement of the proximate cause of the damage and the negligent acts which rendered the defendants, including Shelby County, liable,—"The work was done in such a negligent and careless manner that, unknown to the plaintiff, the pipe lines and the supporting beams were very greatly damaged, the pipe joints were broken and the concrete supports were likewise damaged and broken, which said damage and condition was due to the careless, negligent and inefficient manner in which the fill work was done and the heavy machinery was used in and about the said pipes and concrete foundations."

It has been repeatedly held by the Supreme Court of the State of Tennessee that the mere allegation that acts which are in fact acts of mere omission or commission, non-feasance or mis-feasance cannot be held to constitute a nuisance merely to bring them within the provision of the opinion in *Chandler vs. Davidson County* (1919), 142 Tenn. 265.

In the recent case of Scott v. Knox County (1933), 166 Tenn. 585 at page 588, the Court said, discussing the limits of the Chandler case:

> "That case rests upon and must be confined to its peculiar facts and a strained construction cannot extend its meaning * * * These cases cannot be drawn within the purview of the Chandler case *by mere allegations that acts, which are in fact acts of omission or commission, amount to a nuisance.*" (Italics ours.)

(a) Specifically and definitely under Chapter 897 of the Private Acts of 1937, this particular Flood Control Project on Nonconnah Creek, Wolf River and the Mississippi River, is made a governmental function for Shelby County and for it the County is authorized to issue bonds, levy taxes and exercise the power of eminent domain. Such projects are also made governmental functions for counties in Tennessee, under the Code of 1932, at Sections 4187, 4193, et seq.

(b) But even if the levee and the filling of the ditch were not a public improvement and an active wrong was done the Plaintiff by the negligence of the County employes or subcontractors, such employes or subcontractors might *themselves* be individually liable but *Shelby County* would not.

> "If the injury is a necessary incident of necessary blasting in construction of the highway, the damages are chargeable to the condemnor, here the County. But if the injury is not such a necessary incident, but is the result of negligence of the contractor, then the damages are chargeable to him."
>
> *Newberry v. Hamblen County*, 157 Tenn. p. 491, at p. 495.

"We are of the opinion that the failure of the officers and employees of the County, who, it is alleged, destroyed, or removed the bridge, from the road in question, to erect barriers or place lights or other warnings at the place where said bridge was removed for the protection of travelers, amounted to negligence, but such negligence did not render the county liable to Plaintiff for the injuries sustained under the authorities above cited."

Vance v. Shelby Co., 152 Tenn. 141, at p. 147.

"The demurrer of the County was on the ground that the negligence complained of was shown by the declaration to have been committed by an agent or employee of the County, for which the County is not liable. The Court was clearly correct in sustaining this ground of the demurrer in favor of the County."

Johnson v. Hamilton County, 156 Tenn. p. 300.

Neither the County nor its elected officers are liable for acts of subordinate officers:

Robertson v. Sichel, 127 U. S. 507; 22 R.C.L., pp. 487, 488;

Meacham on Public Officers, Sec. 598, 664.

There is no suggestion or even allegation that the damage to the pipes was a necessary incident of the building of the levee.

(c) The reasons given for this immunity of the County were set out in the case of *McAndrews v. Hamilton County*, 105 Tenn., p. 399, and have been many times approved by the Supreme Court of Tennessee:

"1. That there is no fund out of which satisfaction could be had.

2. That it is better that an individual should suffer than that the public should sustain an inconvenience.

3. That the County is a subordinate political governmental division of the State.

4. That its function or action in regard to such institutions are legislative, and that neither the State or County could be sued on such account.

5. That counties are instrumentalities of government and partake of the immunities of the State while acting in a governmental capacity."

These reasons leave no room for a distinction between the liability of a County for the negligent acts of its officers and agents in the performance of a governmental function and the negligent acts of such officers and agents in the performance of an unauthorized and non-governmental undertaking. If there is no County fund available for the satisfaction of a tort committed within the scope of the authority of the County officers, certainly there is no fund available for the settlement of judgments rendered against a county for the unauthorized and irregular acts of such officers. If it is better that an individual suffer in the one case, the reason holds for the other. If it is contrary to public policy for counties to expend tax money for judgments for damages, a fortiori, is it contrary to such public policy to pay damages accruing by reason of a non-governmental undertaking.

(d) The opinion of **Chandler v. Davidson County, 142 Tenn. p. 265**, is an anomaly, has never been followed in Tennessee since its rendition and was virtually overruled by the opinion in the case of **Fryar v. Hamilton County, 160 Tenn. 216**, which was rendered ten years later.

The authority of the Chandler case was pressed upon the Supreme Court in the following cases but was never followed in any one of them:

Carothers v. Shelby Co., 148 Tenn. p. 185;
Vance v. Shelby County, 152 Tenn. p. 141;
Johnson v. Hamilton Co., 156 Tenn. p. 300;
Odil v. Maury County, 175 Tenn. p. 550.

In the case of *Fryar v. Hamilton Co.*, supra, the Supreme Court virtually overruled the Chandler opinion:

> "The theory upon which the declaration proceeds is that the defendants negligently created and maintained a situation along the highway that constituted a nuisance. The facts presented by the declaration disclose a failure to keep open ditches and drains which are an adjunct to the road, and not separate from it. The facts shown in the declaration do not bring the case within the rule of Chandler v. Davidson Co., 142 Tenn. 266. See, also Carothers v. Shelby Co., 148 Tenn. 186. At most the declaration charges an omission of duty, or act of non-feasance."
> (160 Tenn. 216, at p. 218.)

(e) Of course, since the express allegation in this case of the *Gulf Refining Company v. Shelby County* is that an act or series of acts of negligence broke the pipes of the Company and since there is nowhere pleading nor proof that such acts were unauthorized or beyond the scope of the power of the County employes, or that this breaking of the pipes constituted a *nuisance* or created one, the facts of the Fryar case are identical with the facts of this case and the opinion of the Chandler case is inapplicable.

> "The nuisance is not a mere omission of duty by the County while exercising the delegated sovereign

power of maintaining roads and bridges, *but an active continuing wrong beyond the scope of that power.''*

Carothers v. Shelby Co., 148 Tenn. p. 185, at page 187.

''The creation of a nuisance is not a mere omission of duty by the County while exercising the delegated sovereign power of maintaining roads and bridges, but is an active continuing wrong *beyond the scope of that power.''*

Vance v. Shelby Co., 152 Tenn. 141, at p. 147.

''These cases cannot be drawn within the purview of the Chandler case by mere allegations that acts, which are in fact acts of omission or commission, amount to a nuisance.''

Scott v. Knox Co., 166 Tenn. 585, at p. 588.

Finally, it is difficult to see what comfort the petitioner secures from the opinion in the case of *Odil v. Maury County,* 175 Tenn. p. 550, which was delivered on February 17, 1940, and has been published since the hearing of this case in the Court of Appeals. There is, of course, no statute in Tennessee which renders counties liable in tort, and the series of negligent acts by which the subcontractor broke the pipes of the petitioner could certainly not be reasonably held to be ''a nuisance.'' The opinion in the case of *Odil v. Maury County,* 175 Tenn. at p. 551, contains a very clear statement of this respondent's position:

''In 15 C. J., 569, 570, it is said: ''In the absence of statute a county is not liable for damages to private interests by the construction of public works and improvements.''

With respect to the liability of a county for a tort the text in 14 Am. Jur., Counties, pages 215, 216, is as follows: ''It is well settled that since counties

are organized for public purposes and charged with the performance of duties as arms or branches of the State government, they are never to be held liable in a private action for neglect to perform such duties, for acts done while engaged in the performance of such duties, or because they are not performed in a manner most conducive to the safety of employees or the public, unless such liability is expressly fixed by statute."

This general rule applies to acts constituting nuisances. *Carothers v. Shelby County,* 148 Tenn., 185, 253 S.W., 708; *Vance v. Shelby County,* 152 Tenn., 141, 273 S.W., 577; *Tyler v. Obion County et al.,* 171 Tenn., 550, 106 S.W. (2d), 548; *Wehn v. Commissioners of Gage County,* 5 Neb., 494, 25 Am. Rep., 497; *Lefrois v. Monroe County,* 24 App. Div., 421, 48 N.Y.S., 519; *Matson v. Dane County,* 172 Wis., 522, 179 N.W., 774; *Hubbard v. Crawford County,* 221 Pa., 438, 70 A., 805; *Mokovich v. Independent School Dist. No.* 22, 177, Minn., 446, 225 N.W., 292.

Chandler v. Davidson County, 142 Tenn., 265, 218 S. W., 222, is not in point. The substance of the holding in that case, as interpreted in *Carothers v. Shelby County, supra,* and *Vance v. Shelby County, supra,* is that where the county departs from the delegated sovereign power of maintaining and repairing roads and bridges and creates a nuisance that results in injury, it thereby commits an actionable wrong beyond the scope of its authority and power.

Pierce v. Gibson County, 107 Tenn., 224, 233, 64 S. W., 33, 55 L.R.A., 447, 89 Am. St. Rep., 946, simply applies the universal rule that a court of chancery has authority to enjoin a nuisance."

ARGUMENT.

Since this respondent is a party to only one of the two cases in which the Petition for Certiorari is filed, the respondent is not concerned with the first two grounds, A and B, relied on by the petitioner (Br. p. 9) for filing this petition and for the jurisdiction of this Court.

Considering seriatim, the grounds set out on pages 10 and 11 of petitioner's Brief, this respondent's reply to them is as follows:

C. "Shelby County is liable for breach of its contracts." This statement of fundamental law has never been challenged by this respondent at any stage of this law suit, but the Federal Trial Judge and the Judges of the Circuit Court of Appeals concurred in their finding that there was no proper pleading or proof that respondent had breached its contract.

D. This respondent has never denied that a personal license, when properly evidenced by a written agreement or other sufficient evidence, is unassignable, but this respondent has emphatically denied and denies now that the letter given by petitioner's superintendent to the City Engineer on March 11, 1939, (R. p. 40) was or could now be reasonably construed to be a personal license or separate from the easement deed (R. p. 14) given to this respondent and its assigns by the petitioner. In this contention both the Federal Trial Judge and the Judges of the Circuit Court of Appeals have agreed with the respondent and held that the letter was integrated with and a part of the same transaction out of which the

Easement Deed arose, and that therefore since the grantor in the Easement Deed knew at the time that the rights given would be assigned to the United States Engineers, that the law governing personal licenses had no application. (R. 125, 126).

E. Since this respondent was not a licensee but a grantee with a right to assign, the law applicable to negligence of personal licensees has no application whatever.

F. This respondent has never denied that when private property is damaged in a work of public improvement, it is equivalent to a "taking" of such property within the meaning of the Constitution of the United States and of the State of Tennessee, if and *only if* the damage is necessary for the work of public improvement. If the damage is not necessary but is a result of the negligence of the agent of the County doing the work, then the agent is liable but the County itself is not liable. "If the injury is a necessary incident of necessary blasting in construction of the highway, the damages are chargeable to the condemnor, here the County. But if the injury is not such a necessary incident but is a result of the negligence of the contractor, then the damages are chargeable to him." *Newberry v. Hamblen County,* 157 Tenn. 491 at page 495.

This rule is also laid down in *Vance v. Shelby County,* 152 Tenn. 141 at page 147; *Hale v. Johnson,* 140 Tenn. 182; *Vance v. Hale,* 156 Tenn. 389; *Johnson v. Hamilton County,* 116 Tenn. page 300.

It is not contended that it was necessary to break the pipe lines in order to build the levee.

G. Except for the case of *Chandler v. Davidson County,* 142 Tenn. page 265, which is hereafter fully considered, there is no case in Tennessee in which a County has been held liable for negligence in tort. The case of *Pierce v. Gibson County,* 107 Tenn. page 224, merely holds that where an irreparable injury is about to be done to private property, that a County may be enjoined:

"*Pierce v. Gibson County,* 107 Tenn., 224, 233, 64 S.W., 33, 55 L.R.A., 447, 89 Am. St. Rep., 946, simply applies the universal rule that a court of chancery has authority to enjoin a nuisance." *Odil v. Maury County,* 175 Tenn., page 553.

The case of *Chattanooga v. Dowling,* 101 Tenn., page 342, was a suit against the City of Chattanooga as a municipal corporation, and the rule of liability in tort for municipal corporations is entirely different from the rule applicable to counties in the State of Tennessee.

We have considered the five grounds relied on by the petitioner for filing this Petition for Certiorari in the Supreme Court of the United States against Shelby County. There is not a single one of these grounds that is covered by Section 240 of the Judicial Code or by Rule 35 of this Court in which are set out in detail the reasons for which the Supreme Court of the United States will assume jurisdiction on a Petition for Certiorari and review an opinion and decree of the Circuit Court of Appeals. We submit not only that no jurisdictional ground is laid by petitioner against this respondent, but that all of the grounds laid in the petition against

this respondent were raised and fully argued by the petitioner in the Trial Court and the Court of Appeals and both those courts found against the petitioner on all of those grounds.

The motion of the County to dismiss the complaint as to it was predicated, first, upon the fact that the County is not liable in tort for the negligence of its employes or for the negligence of its independent contractors in the performance of a governmental function; that the County is not liable for breach of contract because it had done all it was obligated to do under the contract and because there was an entire lack of privity of contract between the Defendant Shelby County and the co-defendants Walker and Weaver.

We believe the Court will find conclusively that not only was the Trial Judge amply justified in sustaining the motion of the County to be dismissed prior to the trial, but that had he then overruled the motion and held the County in until the close of the Plaintiff's case, that then and at that time the Trial Court would have been compelled not only on the law but on the evidence introduced by the Plaintiff to have granted a directed verdict for the County and dismissed it on the evidence of this particular case as well as on the law.

The complaint itself, citing the Act of Congress authorizing the work, conclusively shows that the Plaintiff and its officers were well aware of the function that the County had to perform with regard to the Flood Control Project and the building of the levee and its appurtenant structures, that neither the County, nor its officers, employes, or agents, had anything whatever to do with the

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actual work of construction, with its supervision, or even with the letting of the contract therefor. That, therefore, there was neither a relation in contract nor a relation of master and servant between Shelby County and the parties who actually did the damage, even if the doctrine of Respondent Superior could be applied to a County, which is not the law.

It also appears from the testimony that the formal easement deed granted by the Plaintiff acquits and releases the County of this very claim for damages. The testimony also shows that the adequate provision for the continued use of the existing pipe lines of the Plaintiff has been made in the new levee, in accordance with the agreement with the County to that effect.

Defendant Shelby County Is Not Liable for Breach of Contract Either on the Easement or on the Letter Giving Leave to W. B. Fowler to Fill the Ditch.

In considering this phase of the appeal it is necessary to consider not only the formal easement itself and the letter given to the City Engineer to supplement it, but also the testimony of the witnesses introduced by the *Plaintiff* to show the facts and circumstances as well as the intention and knowledge of the parties.

Mr. Lynch, the Superintendent and Executive Agent for the Plaintiff, says:

> "Q. Mr. Lynch, do you mean to tell the Court and Jury that you didn't know that the United States government were going to construct this levee constituting this flood control project at the time your

company gave, and before your company gave this right-of-way to the County?

A. I didn't see any contract or anything.

Q. I didn't ask you if you saw any contract; I asked you if you knew it?

A. I heard about it, yes.

Q. You understood that the United States Government was to construct the levee?

A. Yes, sir.

Q. On the right-of-way that your company gave to the County?

A. That's right.

Q. Who negotiated with you, if negotiations were with you, for this right-of-way for the Company?

A. Mr. Fowler.

Q. Mr. Fowler?

A. Yes, sir.

Q. The same man who negotiated with you for the permit to fill the gully?

A. That's right.

Q. Was there any discussion at that time between you and Mr. Fowler as to the purpose of filling the gully?

A. No, sir.

Q. You didn't ask him any questions about it?

A. No, sir.

Q. In that permit, you stated that it was for the protection of the proposed levee. You knew then that it was the protection of the levee that was to be constructed at that point?

A. He said *they* wanted to fill the ditch.

Q. You stated in your letter that it was for the protection of the proposed levee?

A. Yes, sir.

Q. And you knew that it had reference to this levee at that point?

A. Yes, sir."

(R. 125, 126.) (Italics ours.)

Mr. Fowler, who was also called for the Plaintiff, said:

"Q. Did you tell Mr. Lynch what you wanted the right of way for and who you wanted it for?

A. You mean for the levee?

Q. Yes.

A. Yes, sir.

Q. Did you tell him—did he indicate he understood from anything you said that he knew you were getting it from them on condition that the government would build the levee?

A. I think he knew that, yes.

Q. You necessarily told him that when you asked him to practicallly give you the right of way?

A. I think that's so, yes, sir.

Q. When you were getting this permit to cross the gully—I mean fill the gully—was there any discussion of the need for that, or who it was for?

A. That wasn't a part of the right of way for which we had secured a regular easement from the Gulf Refining Company, and that had been submitted to the Government engineer and that question came up afterwards, and Mr. Lynch was in my office about another matter, I don't recall what it was, and I mentioned that *they* wanted to fill the levee.

Q. *By 'they' you mean the government?*

A. *The government wanted to fill this levee.* He wrote me a letter. Whether he took it up with his superiors or not I don't know, but he wrote me a letter saying there was no objection to having the ditch filled in."

(R. 202, 203.) (Italics ours.)

From these quotations from the testimony of Plaintiff's witnesses it is very evident that the letter of March 11th to Fowler was a supplement to the formal easement granted on February 14th, and that both parties knew that the permit granted in the letter of March 11 was

sought and granted for the U. S. Engineers, that they would use it and that the County would do no work whatever. It is also evident that the parties so considered it at the time.

The filling of the ditch and the building of the levee were both parts of the same contract and transaction between the County and the Gulf Refining Co., since the Plaintiff charges the County with liability for the breach of the following clause of the easement contract:

> "That proper and adequate provision shall be made for the continued use of the existing pipe lines."

This clause on which the County's liability is predicated was taken from the easement of February 14, 1939, and the liability of the County on account of it is to be gauged by the other provisions of that instrument.

(1) The grantor, Gulf Refining Company, knew that the United States Government and not the County was to do the construction work. (Lynch and Fowler testimony, supra R. pp. 125, 126, 202, 203.)

(2) This was contemplated in the easement deed as the habendum is "To Shelby County, Tennessee, and *its assigns.*

(3) Since the County was not to do the work, the Gulf Refining Company in the easement deed and as part of the contract with the County formally acquits and releases the County from "any and all damages • • • by reason of constructing the aforesaid levee, and/or flood walls, and *appurtenant structures, or by the exercise and use of the rights herein and hereby conveyed.*" (Easement R. p. 14.)

(4) The easement was therefore assignable to the United States Government and the indemnity given not only to the County, its officers and employes, but *its agents.* (R. 14.)

(5) The Plaintiff (Br. p. 3, 2nd par.) says that the easement was given for the nominal consideration of one dollar. This is not true as appears from the easement itself. (R. 11.) The consideration was (1) one dollar, (2) maintenance and construction of the levee, (3) building of a private road, (4) provision for use of pipe lines (which might have been terminated by condemnation).

This Court, after reading the record, will not ignore nor discount the great permanent benefit that the "maintenance and construction" of the new levee will be to the Plaintiff. Its property was subject to overflow, which prevented all use of it in times of high or flood water. The new levee and the private road over it willl insure the uninterrupted and continuous use of Plaintiff's plant and property, prevent damage, and provide means of ingress and egress at all seasons. So far from "nominal" is this consideration that we think more properly it should be called "incalculable" in dollars and cents.

Bearing in mind that from the testimony of Lynch and Fowler the Plaintiff and its officers knew that all the work on the levee would be done through the United States Government; that the only obligation of the County and the City with regard to the project was, as set out in the complaint, "to provide without cost to the United States all lands, easements and rights-of-way necessary for the construction of the proposed levee and

its approaches." It is very clear that the letter was a supplement to and a part of the original easement and that the duties of the parties under it were no different from the duty of the parties under the easement. The clause "Proper and adequate provision shall be made for the continued use of the existing pipe lines" of Plaintiff was inserted in the easement merely to make certain that in any plans by the Government Engineers for the new levee ample and adequate provision for the existing pipe lines of the Plaintiff should be made so that Plaintiff could continue after the construction of the new levee to pump its gas from barges on the river as it had in the past. There was no suggestion that the County, which the Plaintiff knew was not going to construct the levee or any part of it, should actively protect the pipe lines. The language of the easement does not have any such meaning or bear any such construction; and, indeed, such a construction would be inconsistent with the habendum of the easement, which is "to the County of Shelby, Tennessee, or its *assigns;*" with the paragraph immediately following the habendum, which is a covenant by the Plaintiff to "the County of Shelby, Tennessee, its officers, employes and agents," and with the following paragraph:

> "And for the consideration mentioned aforesaid, the said vendor, for itself, its successors and assigns, hereby *releases and acquits* the County of Shelby, Tennessee, its officers, *agents* and employes, from any and all damages to the hereinbefore described tract of land by reason of constructing the aforesaid *levees*, and/or *flood walls*, and/or *appurtenant structures*, or **by the exercise and use of the rights herein and hereby conveyed.**" (Italics ours.)

This easement specifically granted land of the Gulf Refining Company for "the construction and maintenance of said levee or any enlargement thereof." (R. 13.) And the letter of March 11th, therefore, was merely a recognition by Mr. Lynch of a notice from Mr. Fowler that the Government had decided on a structure additional and appurtenant to the original levee. Both Fowler and Lynch testify (R. p. 125, 202) that the letter was asked for and given because "they" (meaning the U. S. Engineers) wanted to fill the ditch.

Since all parties knew that the County was not going to do any of the actual construction work and for that reason the Plaintiff, Gulf Refining Company, in consideration of the proposed improvement, fully acquits and releases the County, its officers, agents and employes, from any and all damages to the tract, it results that so long as "proper and adequate provision was made for the continued use of existing pipe lines, the reversal of drainage, and the erection and maintenance of a private road across the levee" (R. 12), the County had fully discharged its obligation under the easement and is without liability.

There is Absolutely No Evidence That the Letter of March 11, 1939, Gave a Personal License To Shelby County.

The letter is short and is as follows:

"MEMPHIS TERMINAL

March 11, 1939.

Mr. W. B. Fowler,
City Engineer,
Memphis, Tenn.
Dear Sir:

Confirming recent conversation in your office, this is to advise that the Gulf Refining Co. grant you permission to fill the ditch at the west end of our property to protect the proposed levee.

Yours very truly,

RML-S

R. M. Lynch,
Superintendent."
(R. 40.)

It is fundamental that a written instrument speaks for itself; that its meaning is to be deduced from its own four corners. In other words, if an instrument creates a personal license, it says so. (Authorities cited by Petitioner, Br. pp. 26-28.) Under this rule, assuming what we do not concede, that the letter granted a *personal* license, that license was granted to Fowler as *City* (not County) Engineer. The County is not mentioned at all, but significantly the purpose of the permit is expressed "to protect the proposed levee."

The idea of a *personal* license had its inception in the resourceful and ingenious imagination of opposing counsel after he had filed his original complaint. In that there

is no intimation of the *personal* license theory, but being met by a clear and complete defense in the County's motion to dismiss (R. p. 15) on the grounds:

(1) That the easement in express words contains a release and acquittal of the claim made;

(2) That the easement is a grant to the County and its *assigns;*

(3) That there was no privity between the sub-contractor who did the damage and the County;

(4) That the County is not liable in tort,

counsel had to devise a new form of attack and amended the original complaint to introduce the personal license theory.

Why is the "*you*" of the letter, which was never acknowledged and is now being used as a self-serving declaration by appellants (the County had been dismissed from the suit at the time of its introduction) which was not addressed to the County or to one of its officials and does not mention the County by name, construed by Plaintiff to mean Shelby County? Obviously because the necessities of the invention of the personal license theory, considering the steps already taken in the suit, required such construction. The Plaintiff, for some reason, had elected to sue the County without joining the City, as was pointed out in our motion to dismiss, and the County was the *grantee in the easement.*

Clearly therefore, the only reason that it is alleegd that the letter is a permit personal to the *County* is that it was part and parcel of the transaction out of which

the easement was given. Being so, it is given as an addendum and supplement to the easement and for the same consideration, with the same limitations and conditions. Therefore, the County is clearly and expressly released and acquitted from all liability from claims for damages on the letter, which covered expressly a fill "appurtenant" to and for the protection of the "proposed levee" because both easement and letter say so. (R. p. 14, 2d par.) (R. p. 40.)

> "The rule that separate written documents between the same parties and relating to the same subject matter is indicated by the language contained therein, or satisfactorily proved by the circumstances under which they were executed, are to be construed together as one transaction, has been determined by so many authorities that there is no room for controversy regarding the principle . . . . This rule applies even though the separate written instruments were not executed on the same date."
>
> *Lynch v. The Bank, Etc.* (Cal.) 37 Pac. 716, at page 720.
>
> "If two or more agreements are executed at different times as parts of the same transaction, they will be taken and construed together."
>
> 17 C. J. S. 715;
>
> 6 R. C. L. p. 850, Sec. 240.
>
> "The question of whether or not two instruments are parts of one and the same transaction depends on the facts of each case."
>
> 17 C. J. S. 715;

Shelby County Is Not Liable In Tort for the Negligence of Its Officers, Subordinate Agents or Independent Contractors Even Though They Be Engaged In a Private Undertaking and Commit An Active Wrong on Private Property.

Appellant admits that the County, as such, is generally not liable in tort for the negligence of its officers, agents, servants and employes, but maintains that in this instance its pipe lines were broken not as the result of a governmental function by the County but by agents of the County who were trespassers on the privately owned property of the Appellant where the pipe lines were located. And further, that the County is liable under the authority of Chandler v. Davidson Co., 142 Tenn. 265, because the destruction of Plaintiff's pipe lines was a nuisance committed actively by the agents of the County beyond the scope of their authority and the performance of any governmental function. *The Chandler case is the only authority cited by appellant for this proposition.*

We insist that the County's part in the Flood Control Project and the construction of the levee and its appurtenant structures was definitely and specifically a governmental function, made so by the general law of Tennessee and by a Private Act of the Legislature of 1937 in which the Nonconnah Flood Control Project is named and authorized.

Section 4187 of the Code of Tennessee of 1932 is as follows:

> "Draining of swamp lands. The draining of swamp lands of this state is a public improvement conducive to the health of the inhabitants and the wealth of the state."

Section 4193 of the Code of Tennessee of 1932 is as follows:

> "County Courts may issue bonds for building levees. The county courts of the several counties within the limits of which are lands rendered unfit for occupation and farming purposes by reason of the overflowing of the same in times of high water in the rivers adjacent thereto, may issue bonds for the purpose of constructing levees to protect the same."

Chapter 897 of the Private Acts of 1937 expressly authorizes Shelby County to issue bonds and levy taxes for the purpose of this Flood Control Project on *Nonconnah Creek, Wolf River, and the Mississippi River.*

So not only under the general law but specifically under a special Private Act of the Legislature, Shelby County is authorized and empowered to levy taxes, issue bonds and exercise the power of eminent domain, for the purpose of building levees and flood walls on Nonconnah Creek and the Mississippi River, and this, in so many words, is declared to be a public improvement. It follows, therefore, that in carrying out the work of such public improvement, Shelby County is performing a governmental function.

As we have shown, the Code of Tennessee makes the drainage of such lands as that of Appellant a public improvement and a function of government.

There is no reason here to repeat the evidence set out in this Brief from page 20 to page 23, showing that Lynch and the officers of Petitioner knew the details of this Flood Control Project, knew that Shelby County had

no active function to perform in the construction of the levee or its appurtenant structures and, therefore, did no work whereby agents or employes of the County might have "committed an active wrong."

Petitioner's property was "privately owned," subject however to the rights voluntarily granted the County, which of course might lawfully have acquired the same or greater rights by condemnation.

The implication in Petitioner's Brief (p. 42) that the County trespassed on private property to commit an active wrong is wholly unjustified. Ingress and egress on private property during a work of public improvement is never a trespass under the Code of Tennessee, Sec. 3131, et seq., Williams Annotated Code of Tennessee.

> "The whole insistence of Plaintiff is that the City had no right to go beyond its 80 foot easement in the construction of the street and that when it did so it was a trespasser doing unnecessary injury to Plaintiff's land, thus giving Plaintiff a right to compensation by an action to trespass. We think Plaintiff's position is untenable."
>
> *Central Realty Company v. City of Chattanooga*, 169 Tenn. p. 525, at p. 529.

Chandler v. Davidson County, 142 Tenn. p. 265.

The case of Chandler v. Davidson Co., 142 Tenn. p. 265, is the only Tennessee authority which the Appellant produces to justify his claim that the County is liable in tort. This case, decided by the Supreme Court in 1919, aside from being an anomaly which has never once been followed in the many County cases decided by the Supreme Court since the date of its decision, differs in all

essential particulars from the case of the Gulf Refining Company v. Shelby County.

1. In the Chandler case, the ditch was separate from and not a part of the highway; here the fill of the ditch of the Gulf Refining Company was part of the levee and joined to it for its protection. The broken pipes were broken by an act or series of acts of negligence while the ditch was being filled for the protection of the levee.

(2) In the Chandler case, the wrong was found to be the continued maintenance of a nuisance, "apart from the road and not in building the road." (152 Tenn. p. 146.) Here there is no nuisance. The County has had no active part in the wrong and the wrong was committed in building the levee, not in a separate operation.

(3) There is no proof or pleading that the officers of Shelby County acted beyond their authority or without authority in building the levee or filling the ditch, and yet to bring this case within the scope of the opinion of the Chandler case, that fact must be made to appear according to the Plaintiff's other authority, *Carothers v. Shelby Co.*, 148 Tenn. p. 185, at page 187:

> "The nuisance is not a mere omission of duty by the county while exercising the delegated sovereign power of maintaining roads and bridges, *but an active continuing wrong beyond the scope of that power.*"

The Chandler case, which was decided in December, 1919, has never once been followed by the Supreme Court of Tennessee in any of its subsequent opinions. The rule laid down in the Chandler case was pressed as controlling

the facts of the case of Carothers v. Shelby County, supra, which was decided in 1922, but its application was denied.

Its application was again denied in the case of *Vance v. Shelby County* (1925), 152 Tenn. 141, at 147, in a bitterly contested series of cases which went three times to the Supreme Court, and in one of which the Court said:

> "The creation of a nuisance is not a mere omission of duty by the county while exercising the delegated sovereign power of maintaining roads and bridges, but is an active continuing wrong *beyond the scope of that power.*"

Fryar v. Hamilton County (1929), 160 Tenn. 216.

We believe that this decision, delivered ten years after the decision in the Chandler case, the Supreme Court of Tennessee definitely overruled the Chandler case, although it did not say so in so many words.

The facts of the Fryar case are identical in all material particulars with the facts of the Chandler case. The Highway authorities of Hamilton County for a long period of time permitted ditches and drains on the highway to be stopped up so that surface waters accumulated. These surface waters overflowed the right-of-way of the highway and accumulated on Plaintiff's *private property and buildings*, for which damage he brought suit against the County. In denying the County's liability the Court said:

> "The theory upon which the declaration proceeds is that the defendants negligently created and maintained a situation along the highway that consti-

> tuted a nuisance. The facts presented by the declaration disclose a failure to keep open ditches and drains which are an adjunct to the road, and not separate from it. The facts shown in the declaration do not bring the case within the rule of Chandler v. Davidson Co., 142 Tenn., 266. See, also, Carothers v. Shelby Co., 148 Tenn. 186. At most the declaration charges an omission of duty, or act of nonfeasance."
> (160 Tenn. 216, at p. 218.)

Surely this opinion is equivalent to a reversal of the Chandler case for there is no material difference between the two sets of facts except that suit in the Chandler case was brought against the County for personal injuries and in the other case for property damage. Surely also, this opinion in the Fryar case, which was delivered ten years after the Chandler case, is a denial of the liability of Shelby County in the case of Gulf Refining Company, and it denies specifically the liability of a County for the active wrong resulting in damage to property privately owned. Indeed, the property of Fryar was damaged by waters flowing from the highway over his private lands and buildings, with no easement, license or permit whatever.

The Supreme Court of Tennessee was called upon to pass on the rule laid down in the Chandler case, in *Scott v. Knox Co.* (1933), 166 Tenn. 585, at p. 588 and said:

> "That case (Chandler) rests upon and must be confined to its peculiar facts and a strained construction cannot extend its meaning. See Carothers v. Shelby County, supra. These cases cannot be drawn within the purview of the Chandler case by *mere*

allegations that acts, which are in fact acts of omission or commission, amount to a nuisance.''
(Italics ours.)

The fallacious reasoning of the Chandler case seems obvious to us. The County, being a corporation, can act only through its officers and subordinates, *Stanley County v. Coler*, 190 U. S. 437; yet, under the Chandler opinion the only instance where the County is *itself* liable is when those officers and subordinates have exceeded their authority and acted beyond the scope of their power.

Again, the County is a mere creature of the sovereign state, partakes of its immunity from suit, and has only such power as the State specifically gives it by statute. The only County funds are derived from taxes which are statutory, yet a wholly unauthorized expenditure of tax money is sanctioned in the Chandler opinion for the payment of a judgment in damages for negligence of the County's officers acting beyond the scope of their power and in disregard of the authority delegated to the County by the State. Gilbert and Sullivan could do no better. In an opinion delivered on Feb. 17, 1940, reported in 175 Tenn., at page 550, the Tennessee Court in *Odil v. Maury County*, again rejected the principles of the Chandler opinion and so the Court has refused to follow the opinion in the Chandler case in a single instance since the opinion was delivered.

In a leading case of the Tennessee Supreme Court, that of *McAndrews v. Hamilton Co.*, 105 Tenn. 399, which has many times been followed and approved by the

Court, it was said that counties of the state enjoy immunity from liability in tort for the reasons:

"1. That there is no fund out of which satisfaction could be had.

2. That it is better that an individual should suffer than that the public should sustain an inconvenience.

3. That it is a subordinate political or governmental division of the State.

4. That its function or action in regard to such institutions are legislative, and that neither the State nor County could be sued on such account.

5. That counties are instrumentalities of government and partake of the immunities of the States while acting in a governmental capacity."

However, petitioner in his Brief, page 42, says: "In Tennessee there is a *well recognized exception* that the County is liable if engaged in a governmental function and there is a departure from County property and a wrong to private property. Petitioner relies upon the exception to hold the County liable in tort, even though the construction of the levee and the filling of the ditch were in the discharge of public duties." If a County is liable for the commission of a tort to property at all, of course it would be "a wrong to private property." The very idea that the County should commit a tort to its own property is an absurdity. The whole matter boils down to this: Was the damage to the pipe lines of petitioner a necessary incident of the construction of the levee? If it was, it amounted to a taking of petitioner's property for public use. For that, the Constitutions of the United States and the State of Tennessee require

compensation, but since there is no assertion or proof that the damage to the pipe lines was necessary or was anything other than a result of acts of the subcontractor, negligent or not, the County is not liable to compensate the petitioner for the damage to these pipes or the result thereof.

The reasons given in the McAndrews case for the immunity of counties leave no place for the "well recognized exception" of Petitioner's Brief, p. 42. If there is no County fund available for the satisfaction of a tort committed within the scope of the authority of the County officials, certainly there is no fund available for the settlement of judgments rendered against a County for the unauthorized and irregular acts of such officials. If it is better that an individual suffer in the one case the reason holds for the other. If it is contrary to public policy for counties to expend tax money for judgments for damages arising from the performance of governmental functions, a fortiori, is it contrary to such public policy to pay damages accruing by reason of a non-governmental undertaking.

Except for the decision of the Chandler case, the Supreme Court of Tennessee from the case of Wood v. Tipton Co., 66 Tenn. 112, cited by appellant, to the recent case of Odil v. Maury Co., 175 Tenn., p. 550, has always clearly recognized the distinction between the liability of *counties* as such and the liability of the *officers* of counties as individuals. Never except in the Chandler case in an action in tort has a judgment in damages for a sum of money been sustained against a county. The rule and distinction of liability on which we insist is recognized

and exemplified in those cases where as in Pierce v. Gibson Co., 107 Tenn. 224, an injunction was granted to prevent the creation or maintenance of a nuisance. The injunction was granted against the *county*, it is true, but the county was in reality a nominal party and the effective relief was against the *officers* or *employees* of the county who were prevented by the injunction as individuals from doing certain things or committing certain acts which would legally constitute a nuisance. We submit, that in the opinion of the Chandler case, 142 Tenn. 265, at p. 272, the court in using Pierce v. Gibson Co., supra, as an authority, failed to take into consideration the very practical and fundamental difference between an injunction which is in personam and a money judgment. Had the rule and the distinction been observed and obeyed Davidson County would have been dismissed and judgment rendered personally against Hirsig and the other defendants (142 Tenn. p. 267) for their misfeasance or nonfeasance as officers of the county.

We submit, therefore, that opposing counsel (as did the learned Judge in the Chandler case) has undertaken to charge the County *itself* with a liability which is chargeable, if at all, to the agents and representatives of the County as individuals. Even if Defendants Walker and Weaver were working on a contract with Shelby County (and not with the United States Government) and if they performed that contract in a negligent manner, Walker and Weaver would be liable as individuals but Shelby County would not be liable at all.

> "If the injury is a necessary incident of necessary blasting in construction of the highway, the damages are chargeable to the condemnor, here the County.

But if the injury is not such a necessary incident, but is the result of negligence of the contractor, then the damages are chargeable to him."

Newberry v. Hamblen County, 157 Tenn. p. 491, at p. 495.

"We are of the opinion that the failure of the officers and employee of the county, who, it is alleged, destroyed, or removed the bridge from the road in question, to erect barriers or place lights or other warnings at the place where said bridge was removed for the protection of travelers, amounted to negligence, but such negligence did not render the county liable to plaintiff for the injuries sustained under the authorities above cited."

Vance v. Shelby Co., 152 Tenn. 141, at p. 147.

So also in

Hale v. Johnson, 140 Tenn. 182;
Vance v. Hale, 156 Tenn. 389.

and in

Johnson v. Hamilton Co., 116 Tenn. p. 300:

"The demurrer of the County was on the ground that the negligence complained of was shown by the declaration to have been committed by an agent or employee of the County, for which the County is not liable. The Court was clearly correct in sustaining this ground of the demurrer in favor of the County."

Neither the County nor its elected officers are liable for the negligent acts of subordinates.

Vance v. Shelby County, supra;
Lunsford v. Johnson, 132 Tenn. 615;
Robertson v. Sichel, 127 U. S. 507; 22 RCL, pp. 487, 488;
Meacham on Public Officers, Sec. 598, 664.

It results, therefore, that Shelby County itself is liable neither for breach of contract on the formal easement,

since it did all that it was obligated to do thereunder, nor on the supplementary letter of March 11th, since the County, through its officers and agents, did none of the work for which leave was granted in the letter, and the officials of the Gulf Refining Company knew that the County would do none of the work for which such leave was granted, at and before the time it was granted on March 11, 1939.

It is equally true that the County itself is not liable for negligence in tort either for the performance of a governmental function or for the performance of a non-governmental private undertaking by its officers, employes or agents.

All grounds urged by the petitioner for the issuance of a Writ of Certiorari by this Honorable Court were fully presented to both the Courts below. Both the Courts concurred in dismissing the respondent, Shelby County, both on the law and the evidence. We insist that the decisions of the lower Courts were correct in all respects and that the issuance of a Writ of Certiorari against this respondent should be denied.

Respectfully submitted,

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